



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

MAY 19 2009

William J. McGinley, Esq.
Patton Boggs LLP
2550 M Street, NW
Washington, DC 20037

RE: MUR 6077
Jeff Larson

Dear Mr. McGinley:

On September 30, 2008, the Federal Election Commission notified your client, Jeff Larson, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). On May 6, 2009, the Commission found, on the basis of the information in the complaint, and information provided by you, that there is no reason to believe your client violated the Act in connection with the alleged coordinated communications and reporting violations in this matter. Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). The Factual and Legal Analysis, which explains the Commission's finding, is enclosed for your information.

If you have any questions, please contact Audra Hale-Maddox, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark Allen".

Mark Allen
Assistant General Counsel

Enclosure
Factual and Legal Analysis

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1 **FEDERAL ELECTION COMMISSION**

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3 **FACTUAL AND LEGAL ANALYSIS**

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5 **RESPONDENT: Jeff Larson**

MUR 6077

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8 **I. GENERATION OF MATTER**

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10 This matter was generated by a complaint filed with the Federal Election Commission by
11 the Minnesota Democratic-Farmer-Labor Party, through its Chairman, Brian Melendez. See
12 2 U.S.C. § 437g(a)(1).

13 **II. FACTUAL SUMMARY**

14 The Complaint alleges that Jeff Larson ("Larson" or "Respondent") acted as the agent of
15 Coleman for Senate '08 and Rodney A. Axtell, in his official capacity as treasurer, ("CFS") and
16 Norm Coleman ("Coleman"), in coordinating communications with the U.S. Chamber of
17 Commerce ("the Chamber") and the National Federation of Independent Business's separate
18 segregated fund, the Save America's Free Enterprise (SAFE) Trust and Tammy Boehms, in her
19 official capacity as treasurer ("NFIB"), which constituted prohibited corporate in-kind
20 contributions in the form of the Chamber's three television advertisements and an excessive in-
21 kind contribution in the form of the NFIB's newspaper advertisement. The Complaint bases its
22 allegation on an asserted "close knit web of relations" between the identified persons, and an
23 asserted common vendor relationship between the Chamber/NFIB and Coleman/CFS through
24 Larson and his company FLS Connect.

25 The Chamber produced and aired three television ads in Minnesota prior to the 2008 U.S.
26 Senate election that focused on the positions of Coleman's opponent, Democratic Senate
27 candidate Al Franken, on the Employee Free Choice Act and tax increases, and on Coleman's
28 achievements as a Senator on health care, respectively. The television ads aired on August 8,

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1 August 28, and September 4, 2008, prior to Minnesota's primary election on September 9, 2008.
2 The available information indicates that these television ads were paid for and aired by the
3 Chamber on Minnesota television stations. For the two Chamber ads that aired fewer than 30
4 days before the primary election, the Chamber disclosed its payments of \$199,463.00 and
5 \$349,967.00 for the electioneering communications. *See* 2 U.S.C. § 434(f).

6 The NFIB ran a full-page newspaper ad in Minnesota prior to the 2008 U.S. Senate
7 election titled "Take a Quick Quiz and See if You're One of the Minnesotans Who Would Have
8 Their Taxes RAISED by Al Franken," and which contained the NFIB SAFE Trust's
9 endorsement of Norm Coleman. The NFIB's ad ran on September 5, 2008, in the *St. Paul*
10 *Pioneer Press* and the *Minneapolis Star Tribune*, prior to the Minnesota primary election on
11 September 9, 2008. On September 4, 2008, the NFIB disclosed its payment of \$84,426.00 for
12 this ad as an independent expenditure on Schedule E.

13 The available information suggests that Coleman and CFS were not aware of the
14 advertisements produced by the Chamber and the NFIB until the ads appeared on the air or in
15 print, and that Coleman and CFS had not been consulted by the Chamber or the NFIB regarding
16 the advertisements prior to their release. Jeff Larson has stated in a sworn affidavit that neither
17 he nor FLS Connect performed any work on the Chamber ads or the NFIB ad at issue in this
18 Complaint.

19 Accordingly, the Commission finds no reason to believe that Jeff Larson violated
20 provisions of the Federal Election Campaign Act of 1971, as amended ("the Act") by acting as
21 the agent of Coleman or CFS in facilitating excessive in-kind contributions or prohibited
22 corporate in-kind contributions in the form of coordinated communications.

III. ANALYSIS

Under the Act, no multicandidate political committee, such as the NFIB's SAFE Trust, may make a contribution, including an in-kind contribution, to a candidate and his authorized committee with respect to any election for Federal office, which in the aggregate exceeds \$5,000. 2 U.S.C. § 441a(a)(2); *see* 2 U.S.C. § 431(8)(A)(i) and 11 C.F.R. § 100.52(d)(1). No candidate or his authorized committee shall knowingly accept a contribution in excess of such limit. *See* 2 U.S.C. § 441a(f). Also, corporate contributions, including in-kind contributions, to a federal candidate and his authorized political committee are prohibited, and candidates and their authorized committees are prohibited from knowingly accepting such contributions. 2 U.S.C. § 441b(a). The Act defines in-kind contributions as, *inter alia*, expenditures made by any person "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents." 2 U.S.C. § 441a(a)(7)(B)(i).

A communication is coordinated with a candidate, an authorized committee, or agent thereof if it meets a three-part test: (1) payment for the communication by a third party; (2) satisfaction of one of four "content" standards; and (3) satisfaction of one of six "conduct" standards. 11 C.F.R. § 109.21.

A. Payment

In this matter, the first prong of the coordinated communication test is satisfied as to both the Chamber's ads and the NFIB's ad because both the Chamber and the NFIB appear to have paid for the ads in question. 11 C.F.R. § 109.21(a)(1).

B. Content

The content prong is satisfied where the communication at issue meets one of the following content standards: an electioneering communication; a public communication that republishes, disseminates, or distributes candidate campaign materials; a public communication containing express advocacy; or a public communication that refers to a clearly identified federal candidate that was publicly distributed or disseminated 90 days or fewer before a primary or general election, and was directed to voters in the jurisdiction of the clearly identified federal candidate. 11 C.F.R. § 109.21(c)(1) - (4).¹

The public communications portion of the content standard appears to be satisfied as to both the Chamber's television ads and the NFIB's newspaper ad because all of the advertisements clearly identify either Coleman or Franken, who were each candidates in the 2008 U.S. Senate election in Minnesota, and because the ads were broadcast or published within 90 days of the September 9, 2008, primary as well as the November 4, 2008, general election within the State of Minnesota.² See 11 C.F.R. § 109.21(c)(4)(i).

¹ After the decision in *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005) (Court of Appeals affirmed the District Court's invalidation of the fourth, or "public communication," content standard of the coordinated communications regulation), the Commission made revisions to 11 C.F.R. § 109.21 that became effective July 10, 2006. In a subsequent challenge by Shays, the U.S. District Court for the District of Columbia held that the Commission's content and conduct standards of the coordinated communications regulation at 11 C.F.R. § 109.21(c) and (d) violated the Administrative Procedure Act; however, the court did not vacate the regulations or enjoin the Commission from enforcing them. See *Shays v. F.E.C.*, 508 F.Supp.2d 10, 70-71 (D.D.C. Sept. 12, 2007) (NO. CIV.A. 06-1247 (CKK)) (granting in part and denying in part the respective parties' motions for summary judgment). Recently, the D.C. Circuit affirmed the district court with respect to, *inter alia*, the content standard for public communications made before the time frames specified in the standard, and the rule for when former campaign employees and common vendors may share material information with other persons who finance public communications. See *Shays v. F.E.C.*, 528 F.3d 914 (D.C. Cir. June 13, 2008). The activity at issue in this matter occurred after the July 10, 2006, effective date of the revisions to Section 109.21.

² Although we do not need to analyze whether the Chamber's two television ads in question also meet the "electioneering communication" content standard, the Chamber disclosed its payments for the ads as electioneering communications. See FEC Form 9 filed by U.S. Chamber of Commerce, dated September 9, 2008. In addition, NFIB filed an independent expenditure report disclosing its payment for the ad. See FEC Form 3X filed by National Federation of Independent Business/Save America's Free Enterprise Trust, dated September 4, 2008.

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C. Conduct

The six conduct standards of the coordinated communication test include situations in which the communication is created, produced, or distributed 1) at the request or suggestion of the candidate, his committee, or an agent thereof; 2) with the material involvement of the candidate, the committee, or agent; 3) after a substantial discussion with the candidate, committee, or agent; 4) by a common vendor; 5) by a former employee or independent contractor; or 6) via republication of campaign material. 11 C.F.R. § 109.21(d).

The Complaint alleges that the advertisements at issue “may also meet the third prong” of the test, stating that the “close-knit web of relations between Senator Coleman, the Chamber, NFIB, Jeff Larson, and FLS-Connect ... taken together, support the inference that the advertisements were produced at the request of Senator Coleman or his agent, with Senator Coleman’s material involvement, or after substantial discussion with Senator Coleman or his agent.” Complaint at 4-5; *see* 11 C.F.R. § 109.21(d). Available information indicates that Larson and Coleman have many connections, including 1) Larson’s service as a long-time advisor for Senator Coleman, 2) Larson’s service as the treasurer of Coleman’s Northstar Leadership PAC, and 3) Coleman’s employment of Larson’s wife in one of his local constituent offices in Minnesota. The Complaint alleges that Coleman, CFS, the Chamber, and NFIB have all been clients of Larson’s firm, FLS Connect, and that the coordination took place through Larson as Coleman’s agent. *See* Complaint at 5. The Complaint further cites this business relationship to support an allegation of coordinated communications through FLS Connect as a common vendor. *Id.* The available information does not support the Complaint’s allegations.

Addressing complainant’s last allegation first, a vendor is a “common vendor” for the purposes of the Act only if the same vendor creates or distributes the ad alleged to be

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1 coordinated and, within 120 days, has provided specified services for the candidate alleged to
2 have benefitted from the coordination. See 11 C.F.R. § 109.21(d)(4). Jeff Larson denies under
3 oath that he or his company contracted for, or otherwise participated in, the creation, production,
4 or distribution of the Chamber's or NFIB's advertisements related to the 2008 Minnesota Senate
5 campaign, or otherwise acting as a coordinator for these communications. See Affidavit of Jeff
6 Larson at 1-2. More broadly, the Response states that Larson and FLS Connect did not perform
7 any work at all for the NFIB during the 2008 election cycle, and states that FLS Connect's only
8 work for the Chamber during the 2008 election cycle was membership drive telemarketing. See
9 Response at 1-2.

10 To fulfill the common vendor standard of the conduct prong, it is not sufficient for the
11 entities involved to have merely hired the same commercial vendor for different work at various
12 points in the past. Instead, the common vendor must be performing work for the candidate or the
13 candidate's committee within 120 days of creating, producing, or distributing the specific
14 communication(s) alleged to have been coordinated, see 11 C.F.R. § 109.21(d)(4)(ii). Thus, the
15 available information indicates that FLS Connect is not a common vendor for the purposes of the
16 Act.

17 Although the Complaint infers that the advertisements were produced at the request of
18 Senator Coleman or his agent, with Senator Coleman's material involvement, or after substantial
19 discussion with Senator Coleman or his agent, the available information indicates that CFS and
20 Coleman did not have knowledge of the Chamber and NFIB ads or their contents prior to their
21 release, and the available information indicates that the Chamber and the NFIB did not gain
22 information regarding the Coleman campaign prior to producing their ads from Larson or others.
23 See 11 C.F.R. § 109.21(d)(1)-(3).

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1 There is no other support offered for the Complaint's allegation as to the coordinating
2 conduct. Unwarranted legal conclusions from asserted facts, or mere speculation, will not be
3 accepted as true, and "[s]uch speculative charges, especially when accompanied by direct
4 refutation, do not form an adequate basis to find reason to believe that a violation of FECA has
5 occurred." Statement of Reasons in MUR 4960 (Hillary Rodham Clinton for U.S. Senate
6 Exploratory Committee), issued December 21, 2000 (citations omitted). Here, Complainant's
7 inferences are convincingly refuted by the available information including Larson's Response,
8 which denies knowledge of the NFIB or the Chamber's actions with regard to the 2008 campaign
9 in general or the advertisements in particular, and denies any coordinating activity. The conduct
10 prong of the coordinated communications test does not appear to be fulfilled in this matter, and
11 so the Chamber's and NFIB's communications do not appear to have been coordinated with
12 Coleman or CFS through Larson. Accordingly, Larson does not appear to have been the agent of
13 Coleman or CFS regarding the alleged excessive or prohibited in-kind contributions. See
14 2 U.S.C. §§ 441a(f) and 441b(a).

15 For the reasons set forth above, the Commission finds no reason to believe that Jeff
16 Larson violated the Act in connection with the alleged coordinated communications.

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